Supreme Court, U. S.
FILED
FEB 1 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1066

AMERICAN INDUSTRIES CORPORATION,
Petitioner,

v.

SHARON STEEL CORPORATION,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND APPENDIX

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STATEMENT OF THE CASE

American Industries Corporation ("AMI") filed this action against Sharon Steel Corporation ("Sharon") in the United States District Court for the Western District of Pennsylvania on November 18, 1974. Three years later, on November 30, 1977, trial began before the Honorable Herbert P. Sorg and a jury. The trial lasted 17 days.

At the time of trial, AMI sought to impose liability on Sharon for breach of a contract for the sale of steel beginning in 1973; for breach of a contract for the sale of steel in 1974 and thereafter; for a conspiracy in violation of section 1 of the Sherman Act, 15 U.S.C. § 1; and for tortious interference with actual or prospective business relations of AMI.

Sharon itself pursued a counterclaim, alleging that AMI breached the 1974 contract. Sharon contested the

1973 contract claim on the grounds both that no breach had occurred and that Sharon's performance of the 1974 contract served to discharge entirely the 1973 contract. Sharon also denied the Sherman Act and common law tort claims.

The trial judge submitted the case to the jury on the basis of 22 special interrogatories. These interrogatories were formulated during an afternoon and evening conference between counsel and the judge on the day before trial ended. The interrogatories and the charge were directed to the specific areas of disputed fact.

As to the 1973 contract claim, the specific dispute between the parties concerned the amount and time of shipment of steel under the contract. AMI contended that a minimum of 7,500 tons were to be shipped within each month of 1973. Sharon contended that the steel was to be shipped on a "flywheel" or "excess tonnage" basis; that is, Sharon would ship the steel beginning (but perhaps not ending) in 1973 in such amounts and at such times as Sharon had excess production capacity in its mill.

Without objection from the parties, then or now, the court instructed the jury that this was the determinative factual question as to the 1973 contract dispute. A.17a-18a and 35a.[1] The trial court also instructed the jury concerning the burden of proof and concerning the elements of a binding contract. A.18a-19a. The jury was then asked the following interrogatory and gave the following answer:

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1. The reference "A." refers to the appendices to AMI's Petition for Writ of Certiorari or to the successively paginated appendix to this Brief.

1. Did Sharon breach the agreement for 1973?

   Yes ___

   No X

The jury concluded that the 1973 contract did not require minimum monthly shipments and that Sharon properly made deliveries on a flywheel basis.

There were three areas of dispute between the parties concerning the 1974 contract. First, the parties disagreed about the intended effect of the 1974 contract on the remaining obligations of the parties under the 1973 contract. AMI argued that only full performance of the 1974 contract would discharge the 1973 contract. Sharon's contention was that the 1973 contract was fully discharged upon execution of the 1974 contract. The trial court explained this dispute to the jury, asked the following interrogatories and received the following answers:

2. Did the parties intend that the agreement for 1973 and any obligations arising under the agreement for 1973 would be cancelled by the agreement for 1974?

   Yes ___

   No X

4. Answer this only if your answer to Interrogatory 2 is No. Did the parties intend that full performance of the agreement for 1974 would replace and cancel all obligations of the parties under the agreement for 1973?

   Yes X

   No ___

Thus, the jury ruled in accordance with AMI's contention on this point.

Second, the parties disagreed concerning the schedule of deliveries under the 1974 contract. AMI argued that Sharon was obliged to ship an absolute minimum monthly quantity of 5,700 tons of steel throughout the term of the agreement and that Sharon had not done so. Sharon argued that it was obliged to ship substantial tonnages of steel in each month averaging over the term of the contract 5,700 tons. Sharon alternatively argued that any deviation from deliveries of 5,700 tons in each month was by a small amount and was immaterial.

The trial court explained this aspect of the 1974 dispute to the jury and instructed the jury, without objection then or now, that only a material departure from the requirements of a contract will constitute a breach. A.23a-24a. The court then asked the following questions and received the following answers:

5. Did Sharon agree to deliver to AMI no less than a minimum quantity of 5,700 tons of steel in each month during the term of the agreement for 1974?

   Yes X

   No ___

6. If your answer to Special Interrogatory 5 is "yes" did Sharon fail to comply with that term of the agreement for 1974?

   Yes ___

   No X

The jury thus found that Sharon was obliged to ship 5,700 tons of steel in each month and that it complied in material respects with this requirement.

Third, the parties disagreed concerning the price to be paid by AMI under the 1974 contract. AMI argued that the price was to be at or close to the price charged by major steel manufacturers. Sharon contended that the price was to be the same price as Sharon charged its customers generally. The trial court explained this dispute to the jury, asked the following question and received the following answer:

10. Did Sharon agree that the prices to be charged AMI under the agreement for 1974 were to be based on those established by the major mills, principally U.S. Steel?

    Yes ___

    No X

The AMI antitrust and tort claims rested in major part upon the breach of contract claims. The only damages sought by AMI at trial were such damages as it claimed resulted from failure to deliver steel in accordance with its view of the 1973 and 1974 contracts or from the alleged overpricing of steel delivered under the 1974 contract. AMI argued that Sharon's establishment and operation of a subsidiary that competed with AMI, together with certain alleged unfair actions, converted the simple breach of contract claims into antitrust and tort claims. In this connection, the trial court asked the jury the following interrogatories and received the following answers:

17. Did Sharon engage in a course of conduct specifically designed to injure AMI by interfering with its business relations with others?

Yes ___

No X

21. Do you find that Sharon combined or conspired with Ohio Metal Processing Company [Sharon's subsidiary] with the intent or for the purpose of eliminating or destroying AMI as a competitor of Ohio Metal Processing Company?

Yes ___

No X

22. Did Sharon enter into a combination or conspiracy with Ohio Metal Processing Company to injure competition and to unreasonably restrain trade or commerce?

Yes ___

No X

In accordance with the answers to these and other special interrogatories, the trial court entered judgment against AMI on its claims and in favor of Sharon on its counterclaim.

The trial court subsequently denied AMI's Motion For New Trial and Motion to Alter or Amend the Judgment, saying:

> I believe the case was thoroughly and carefully tried on the issues presented. As thoroughly as I know how, I have not discovered any erroneous influences that I can find which would warrant the retrial of these complicated issues.

Tr. of Hearing on May 9, 1978, at 77.

On appeal to the Third Circuit Court of Appeals, the judgment and the trial court's denial of the post-trial motions were affirmed. The Third Circuit's opinion had two separate foundations.

Realizing that this case turned entirely upon its facts and not upon contested issues of law, the Third Circuit first examined the trial court charge in the context of the 22 special interrogatories. It found that the key interrogatories to the jury were straightforward and strictly factual questions not requiring an elaborate charge to be understood. The court concluded that the charge as to the interrogatories fully satisfied the requirement of Rule 49(a) that the jury have "such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue." Fed.R.Civ.P. 49(a).

Although this conclusion would have been dispositive itself, the Third Circuit went on to decide that AMI had not demonstrated reversible error by the district court in refusing to give 75 of AMI's particular requested points for charge. As to two points that AMI properly preserved, the Third Circuit found that the trial court had not abused its discretion. As to the numerous other points not properly preserved by AMI, the Third Circuit concluded there had been no fundamental error.

The Court of Appeals also concluded that the jury's answers to interrogatories were consistent with each other and were supported by the evidence.

The Third Circuit denied AMI's petition for rehearing on November 28, 1978. A.7a.

REASONS FOR DENYING THE WRIT

I. & II. In View Of The Specific Factual Questions Put To The Jury, The Trial Court's Charge Is Well Within The Accepted And Usual Course Of Judicial Proceedings, Raises No Important Question Of Federal Law And Provides No Special And Important Reason Justifying Review By This Court.

Arguments I and II in AMI's Petition For Writ Of Certiorari cover the same point: "[T]he instructions to the jury were incomplete, insufficiently detailed, confusing, erroneous and misleading so as to require reversal." Petition at 6 and 12. Arguments I and II merely seek to support this overall claim by referring to different episodes from the charge. Part I refers, out of context, to the trial court's use of the term "monopoly". Part II refers to a confused portion of the charge concerning the 1973 contract, without citing the trial court's unmistakeably clear correction of this confusion.

More important than the frailty, treated more fully below, of these particular episodes is that the dispositive interrogatories were highly detailed. Not all the interrogatories were so detailed, but the dispositive ones—those relating to the 1974 contract—were.

This Court has stated that it will not grant a writ of certiorari where the issues in dispute affect only the parties or where the questions presented for review are abstractions that will not affect the outcome of the case. *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959); *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955).

Because of the detailed findings of the jury, this case raises only the question whether the charge as to

the 1974 interrogatories "enable[d] the jury to make its findings on each issue." Fed.R.Civ.P. 49(a). AMI does not seek review of this question, since it affects only these parties and is not of substantial federal importance. Because of the specific findings of fact, particularly concerning the 1974 contract, the issues AMI does raise are only abstractions not appropriate for this Court's consideration.

It is difficult to imagine questions more detailed than those relating to the 1974 contract:

4. Answer this only if your answer to Interrogatory 2 is No. Did the parties intend that full performance of the agreement for 1974 would replace and cancel all obligations of the parties under the agreement for 1973?

   Yes X
   No ___

5. Did Sharon agree to deliver to AMI no less than a minimum quantity of 5,700 tons of steel in each month during the term of the agreement for 1974?

   Yes X
   No ___

6. If your answer to Special Interrogatory 5 is "yes" did Sharon fail to comply with that term of the agreement for 1974?

   Yes ___
   No X

10. Did Sharon agree that the prices to be charged AMI under the agreement for 1974 were to be

based on those established by the major mills, principally U.S. Steel?

Yes ___

No X

Interrogatories 4, 5 and 10 are strict fact questions that require no complex instructions to be understood. The jury needed only to understand the proper burden of proof and that an agreement may exist not only by express statement but also by a promise or commitment conveyed by word, conduct or silent acquiescence. The court charged without objection, at trial or now, on these points. A.18a-19a and 24a.

Interrogatory 6 asks the jury to put the strictly factual determinations in interrogatory 5 together with the essentially uncontested facts concerning the amount and time of actual shipments in 1974. The only issue for the jury on interrogatory 6 was whether there was a material variance between the facts concerning the amount and time of shipments and Sharon's promises as found in answering interrogatory 5.

AMI insisted at trial that the question of materiality be covered in the charge, rather than specifically in an interrogatory, as requested by Sharon. A. 44a. As counsel for AMI stated to the trial judge, "I think that the law is that it is understood that a breach has to be a material breach. . . ." *Id.* The trial judge concurred and instructed the jury in detail on the materiality point. A.23a-24a.

In addition to his general instructions on burden of proof, the elements of an enforceable agreement and materiality, the trial judge described the interrogatories briefly and simply. A.20a-22a.

To have given further instructions on any other point with respect to contract liability in 1974 would have been confusing surplusage. Although one might feel that a charge could have been better organized or more elegantly stated, a trial court has broad discretion in framing the charge. *Harris v. United States,* 367 F.2d 633 (1st Cir. 1966), *cert. denied,* 386 U.S. 915 (1967). Where special interrogatories are used, the basic inquiry is always whether the instructions contained what was necessary to resolution of the questions put to the jury and whether the instructions were phrased so as to be understood by the common man. Fed.R.Civ.P. 49(a); *Reyes v. Wyeth Laboratories,* 498 F.2d 1264, 1289, 1291 (5th Cir.), *cert. denied,* 419 U.S. 1096 (1974). By this standard, the trial court's charge was well within its discretion and was fully adequate to guide the jury's deliberations on interrogatories as detailed as numbers 4, 5, 6 and 10.

The jury's findings as to the 1974 contract preclude a finding of liability against Sharon on any other phase of AMI's claim.

As to the 1973 claim, the jury's specific findings that full performance of the 1974 contract would excuse further obligations under the 1973 contract and that Sharon did not breach the 1974 contract preclude any liability on the earlier contract.

Absent a breach of contract there could also be no liability on the antitrust and tort claims stated by AMI. The only damages claimed by AMI were those measured by alleged short shipments or overpricing under the contracts. Without proof of damages, antitrust and tort claims cannot stand. As final but not necessary nails in the coffin of the antitrust and tort claims, the jury made

specific determinations about Sharon's conduct toward AMI:

> 17. Did Sharon engage in a course of conduct specifically designed to injure AMI by interfering with its business relations with others?
>
> Yes ___
>
> No X
>
> 21. Do you find that Sharon combined or conspired with Ohio Metal Processing Company with the intent or for the purpose of eliminating or destroying AMI as a competitor and to unreasonably restrain trade or commerce?
>
> Yes ___
>
> No X

Given all this, it would not have been possible for the jury to find that Sharon had "enter[ed] into a combination or conspiracy with Ohio Metal Processing Company to injure competition and to unreasonably restrain trade or commerce." Special Interrogatory 22, A.12a. Yet AMI selects a small part of the trial court's antitrust charge as the first episode supporting its claim that the entire charge was inadequate.

Specifically, AMI takes issue with the fact that the trial court, in discussing Special Interrogatory No. 21, alluded to monopoly.[2] A.29a. This issue was never raised

2. AMI also complains about the trial court's refusal to charge the jury on three theories of per se antitrust liability. The trial court rejected these as unsupported by the evidence. The Third Circuit found no fundamental error in that rejection. The Third Circuit also found all of the jury's findings to be supported by the evidence. There is thus no record here upon which to resolve issues of per se antitrust liability.

in the trial court. After giving the charge about which AMI now complains, the trial court held a conference in chambers and specifically asked that counsel "make any request they wish or . . . take exceptions to the charge so that it might be corrected before the jury begins their actual deliberations." A.54a. AMI made other objections at that time but said nothing about the reference to monopoly. Nor did AMI make this point to the trial court in its motion for new trial.

AMI's failure to raise this point in the trial court not only precludes reliance on it now, Fed.R.Civ.P. 51, but also supports the conclusion that in any event there was no error in the reference to monopoly. Surely, if there really were so gross an error as AMI claims, its experienced counsel would have objected strenuously. AMI's silence is itself a demonstration that the references to monopoly, taken in context, did not result in an erroneous charge to the jury.

The trial court advised the jury that any unreasonable restraint of trade or injury to competition would be adequate under Section 1 of the Sherman Act, 15 U.S.C. §1, to support antitrust liability, A.31a:

> Remembering the purpose of the antitrust laws, that is, to preserve competition, if you should find by a preponderance of the evidence that Sharon and Ohio Metal Processing engaged in a course of conduct or entered into a combination or conspiracy to impose restraint on the free movement of trade, in other words, simply to affect competition, we'll say, to remove competition to its full extent, from a relevant market area, and [then] an affirmative to this question is warranted.

AMI points to the language "to remove competition to its full extent" as an instruction that a restraint of trade must be such as would eliminate competition entirely or result in a monopoly. In context with the other phrases, however, such as "to impose restraint on the free movement of trade" and "simply to affect competition", the phrase "to remove competition to its full extent" meant "to render competition less than full." Viewed in context, this instruction told the jury that it should find an unreasonable restraint of trade if Sharon's conduct prevented competition from operating "to its full extent."

AMI points also to the trial court's earlier specific use of the term "monopoly." A.29a. However, this reference to monopoly was merely part of the transition from discussion of the contract claims to discussion of the antitrust claim. Considered together with the rest of the charge and with the language of the special interrogatories, there was no error in the mention of monopoly.

The second episode relied upon by AMI is an admittedly confusing description by the trial court of Sharon's contention concerning the delivery schedule under the 1973 contract. Petition for Writ of Certiorari at 12-13. At Sharon's request, the trial court corrected this confusion, A.35a:

> I may have misrepresented a contention of Sharon Steel, however, with respect to the time and quantity of deliveries during 1973. I believe I stated that it was Sharon's contention that or that it was Sharon's contention that the arrangement for 1973 had to do only with a total volume to be delivered during the term of the contract. This is not Sharon Steel's contention. It is Sharon Steel's contention that they did not agree to delivery of any specific quantities of steel. In 1973, there was to be a continuation of the previously adopted arrangement and steel would be delivered as available on what had been referred to in the testimony as a flywheel basis. This is a contention of Sharon and not that they had agreed to an overall quantity.

From all of the foregoing discussion, it is clear that, contrary to AMI's argument, the Third Circuit's result does not depend upon slavish adherence to *Lawrence v. Gulf Oil Corp.*, 375 F.2d 427 (3d Cir. 1967), and is not contrary to rulings of other circuits. *Lawrence* does not sanctify every use of special interrogatories. It requires that each case be examined in detail to determine whether the charge together with any special interrogatories properly placed the issues before the jury. Moreover, the uniform approach of the circuits is to determine the adequacy of a charge through examination of the particular facts and circumstances of a case. This is just what the Third Circuit did in rejecting AMI's challenge to the trial court's charge.

The charge here adequately explained a series of straightforward, determinative factual interrogatories; the jury answered these interrogatories in favor of Sharon; and the District Court and the Third Circuit both found that the jury's answers were supported by the evidence. The conduct of the trial court and of the Third Circuit thus was well within "the accepted and usual course of judicial proceedings." Sup. Ct. R. 19. Since these facts raise no special or important question of federal law, this Court should allow the case to rest upon the clearly expressed and dispositive findings of the jury.

III. The Third Circuit's Conclusion That AMI Waived Most Of Its Objections To The Trial Court's Jury Instructions Is Fully In Accord With The Law In Other Circuits And Is, In Any Event, Not Necessary To Support The Third Circuit's Decision.

In considering challenges to jury instructions, the circuits have consistently enforced the requirement of Fed. R. Civ. P. 51 that:

> No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection.

In *Palmer v. Hoffman,* 318 U.S. 109, 118 (1943), this Court explained the reason for this rule:

> In fairness to the trial court and to the parties, objections to a charge must be sufficiently specific to bring into focus the precise nature of the alleged error. Where a party might have obtained the correct charge by specifically calling the attention of the trial court to the error and where part of the charge was correct, he may not through a general exception obtain a new trial.

The rule thus has two purposes: (1) to make abundantly clear each party's position and (2) to give the trial court a full opportunity to correct any errors.

Neither of these purposes had been achieved at the time AMI made the general exception upon which it now relies. AMI had filed more than 100 requested points for charge. Those requests, however, were filed before trial. They did not take account of unanticipated developments during the lengthy trial or of the special interrogatories

formulated in conference between the trial court and counsel at the close of the evidence. Moreover, there was never a discussion with the court concerning these pretrial requested points for charge.

On the day before the charge, the trial court denied all the pretrial suggested points for charge and advised counsel that he would ask them after his charge, and while the jury was at lunch, to submit any additional requests or objections. A.52a. He did just that.

After the initial charge and while the jury was at lunch, counsel for Sharon proposed that both parties be granted exceptions as to those points for charge which had been submitted before trial and which were not given by the court. A.52a-53a. Both the court and counsel for AMI immediately responded adversely to this suggestion, A.53a:

> *The Court:* I would like the opportunity to correct any errors or—
>
> *Mr. Schmidt [Counsel for AMI]:* I don't know if that's possible under Rule 51.
>
> Rule 51 really says you can't mousetrap the court.
>
> * * *
>
> *Mr. Schmidt:* And really what you have to do is tell the Court now—and I don't mean you. I'm speaking you impersonally—if any of us think that the Court has made any mistakes that we are going to rely on later, that the time to mention it is now, and give the Court an opportunity to reconsider it.
>
> First of all, I don't think that's in keeping with the spirit of Rule 51.
>
> And secondly, even if we did it, I'm not sure that it would be valid under the rule, because we're sup-

posed to tell the Court now what we think so the Court can consider it.

The trial judge then expressly invited "counsel to make any request they wish or to take exceptions to the charge so that it might be corrected before the jury begins their actual deliberations." A.54a. In response to the court's request, counsel for AMI made several specific objections to the charge. A.54a-58a. At least one of AMI's objections resulted in an additional instruction by the trial judge. A.35a-36a.

After discussion of these various points, counsel for Sharon asked, "You have completed yours?" A.59a. Counsel for AMI responded, "Yes." *Id.* AMI thus plainly indicated that it had made all the points it considered to be important.

Following the discussion of Sharon's specific objections to the charge, counsel for Sharon stated: "We take an exception to the Court's denial of all the requests for points of charge." A.70a. Counsel for AMI at this point injected, "We do the same as to ours, Your Honor." *Id.*

AMI's contention apparently is that some circuits would have ruled that such a general exception is adequate to preserve some 75 distinct objections to the charge. No circuit, however, countenances the sort of general exception relied upon by AMI, especially where, after the charge, the trial judge invites the parties to object specifically to anything in the charge. *Copperweld Steel Co. v. Demag-Mannesman-Bohler,* 578 F.2d 953, 960 (3d Cir. 1978); *United States v. Hollinger,* 553 F.2d 535, 542 (7th Cir. 1977) ("Of course, if the trial judges in this circuit prefer to do so, they are empowered to require the voicing of objections after the charge is given.")

AMI attempts to place itself within an exception to Rule 51 that "[t]he failure to object [pursuant to Rule 51] may be disregarded if the party's position has previously been clearly made to the court and it is plain that a further objection would be unavailing." Wright & Miller, *Federal Practice & Procedure* § 2553 at 639-40 (1971).[3]

All the circuits, including the Third Circuit, follow this "pointless formality" rule where the facts warrant its application. *United States v. General Motors Corp.,* 226 F.2d 745 (3d Cir. 1955). *See also, French v. United States,* 487 F.2d 1246, 1247 n.1 (1st Cir. 1973); *Steinhauser v. Hertz Corp.,* 421 F.2d 1169 (2d Cir. 1970); *Buckley v. Valley Camp Coal Co.,* 324 F.2d 244 (4th Cir. 1963); *Industrial Development Bd. of Town of Section, Ala. v. Fuqua Industries, Inc.,* 523 F.2d 1226 (5th Cir. 1975); *Batesole v. Stratford,* 505 F.2d 804 (6th Cir. 1974); *Mays v. Dealers Transit, Inc.,* 441 F.2d 1344 (7th Cir. 1971); *Meitz v. Garrison,* 413 F.2d 895 (8th Cir. 1969); *Union Pacific R. Co. v. Owens,* 142 F.2d 145 (9th Cir. 1944); *Dunn v. St. Louis-San Francisco Co.,* 370 F.2d 681, 684 (10th Cir. 1966); *Stewart v. Ford Motor Co.,* 553 F.2d 130 (D.C. Cir. 1977).

In this case, however, AMI's so called 75 objections to the charge were never expressed, and the trial judge had no opportunity to correct whatever errors AMI meant to cover in its general exception.

The principal case relied upon by AMI, *Gradsky v. Sperry Rand Corp.,* 489 F.2d 502 (6th Cir. 1973), is par-

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3. *Stewart v. Ford Motor Co.,* 553 F.2d 130 (D.C. Cir. 1977), after quoting the exception from Wright & Miller, states: "The authors, however, correctly note that the better practice is to renew the objection at the close of the charge." 553 F.2d at 140 n.11.

ticularly instructive in this regard. The court there notes that, in addition to 50 proposed instructions, the appellant filed 96 written objections to the other party's proposed instructions. The Sixth Circuit also states that "[a]fter an exhaustive review, including three informal conferences in chambers where the proposed charges were reviewed and discussed, the trial court charged the jury." 489 F.2d at 503.

The other pointless formality cases cited by AMI similarly rest upon facts demonstrating that the two purposes of Rule 51 had been satisfied. And one of those cases comments that the exception to Rule 51 is "often stated but rarely applied." *Batesole v. Stratford,* 505 F.2d 804, 808 (6th Cir. 1974).

In the present case, AMI, while submitting numerous requested points for charge before the start of trial, filed no objections to any of the points submitted by Sharon. More importantly, while there were several in-chambers discussions concerning the form and content of the special interrogatories, there was virtually no discussion of the pretrial requested points for charge, and certainly not the "exhaustive review" referred to in *Gradsky.*

Plainly, it would not have been a pointless formality for AMI to assert specific objections in response to the trial court's request. Counsel for AMI actually objected to several aspects of the charge, and an additional charge was given on one point as a result of those objections.

AMI has not established, nor could it, that the circuits are in conflict in the treatment of general exceptions to a charge, where the two purposes of Rule 51 have not been satisfied and where the trial court specifically asked for all objections. Accordingly, on the record here, the question on which AMI seeks review is purely

"academic." Review should be denied. *Rice v. Sioux City Memorial Park Cemetery, Inc.,* 349 U.S. 70, 74 (1955).

There is one final reason why certiorari should not be granted on the third question presented by AMI. The decision of the Court of Appeals did not depend upon its finding that AMI had waived most of its objections to the charge. The Court of Appeals' decision rests principally upon a determination that, in view of the 22 special interrogatories, the trial court's charge was proper under the standard of Rule 49(a). A.3a. Where there is an alternative ground for the decision below, this Court has ruled that a writ of certiorari will not be granted. *The Monrosa v. Carbon Black Export, Inc.,* 359 U.S. 180 (1959).

CONCLUSION

For the foregoing reasons, AMI's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

Appendix J

THURSDAY, DECEMBER 22, 1977

PITTSBURGH, PENNSYLVANIA

BEFORE: Honorable Herbert P. Sorg, J.

APPEARANCES:

For the Plaintiff:

ROSE, SCHMIDT AND DIXON
By: HAROLD R. SCHMIDT, ESQUIRE
H. YALE GUTNICK, ESQUIRE

TANNENBAUM, DUBIN & ROBINSON
By: MARVIN S. ROBINSON, ESQUIRE
MICHAEL JAY KLOSK, ESQUIRE

For the Defendant:

REED, SMITH, SHAW & MCCLAY
By: RICHARD T. WENTLEY, ESQUIRE
DANIEL BOOKER, ESQUIRE
MAYNARD MOORE, ESQUIRE

TRANSCRIPT OF OFFICIAL NOTES OF TESTIMONY OF AN IN CHAMBERS DISCUSSION IN THE ABOVE-CAPTIONED CASE TAKEN BY:

Michael D. Powers
Sandra D. Wenger
Official Court Reporters

at 9:40 a.m. and 2:20 p.m.

PROCEEDINGS

(Thereupon, court reconvened on Thursday, December 22, 1977 at 9:40 o'clock a.m.)

Mr. Booker: Interrogatory 7 and 12 relate to the materiality of any breach sustained, any breach by American Industries. The relevance of that, Your Honor, is that Section 612 of the Uniform Commercial Code, which deals with installment contracts, which we have in this case, provides that whenever a nonconformity or default with respect to one or more installments substantially impairs the value of the whole contract, there is a breach of the whole. And we think it is necessary, for the record to be complete, for the jury to decide whether, for example, if there were short shipments in June and July of 1974, whether that was a material breach, such that it impaired the value of the whole contract.

And we are using the word "material" to convey this meaning of whether or not it impaired the value of the whole contract, such as to justify repudiation of the contract.

Mr. Gutnick: Your Honor, our position would be that the concept of material breach is merely an element of the cause of action, just as a contract requires an offer, acceptance, consideration, just as an antitrust unreasonable restatement requires certain elements to be proved and this merely is an element, and it bogs down the whole concept of special interrogatories.

If you had to give to the jury a special interrogatory on each element on each cause of action, we would probably have 30 more pages, and what this does is iso-

late one of the elements to try to have the jury's concentration focused on it, and perhaps move them away from the critical questions which have to be answered here.

It's a matter that, as I indicated in my covering letter, it's a matter which is appropriate for the charge to the jury, but not a special interrogatory to the jury.

And we've numbered and framed these in such a way that if these two are eliminated, we merely put them in there to have a complete set before Your Honor.

They were not covered last night and no one mentioned them last night.

But Mr. Booker called me after we reviewed these yesterday evening, or actually this morning, in the early hours, and I agreed to put it in here just so Your Honor could see them and make an appropriate ruling this morning. But we vigorously insist that it's an appropriate matter for Your Honor's charge, as opposed to a special interrogatory.

Mr. Schmidt: Your Honor, may I add this? I said I wasn't going to say anthing because I didn't want to forget anything that I was learning last night in preparation for the final argument. But I think that the law is that it's understood that a breach has to be a material breach, and this is something that would be properly covered in instructions to the jury as to determining whether there is a breach or not.

To pick out two separate areas and use the term "material" and breach for those, would seem to place greater emphasis than the law would place upon it and thus I think would be prejudicial.

Mr. Booker: The two areas to which it relates are the two areas as to which the plaintiff claims there has been a breach.

And we are dealing with the Uniform Commercial Code, which specifically says in dealing with installment contracts, that where there is a variation from what the contract calls for in any particular installment of shipments, that that justifies repudiation of the entire contract and constitutes a breach of the entire contract only if it substantially impairs the value of the whole.

I submit if the jury were to say that Sharon had failed to comply with the shipment terms, that the record would not be complete, and we would not have a finding of fact on the further question which is necessary to decide liability under Section 612 of the Code, on whether that breach went to the value of the entire contract.

The Court: And that's what you defined as materialized?

Mr. Booker: Yes. I was trying to come up with a term that would get at that point. I'd be willing to use the statutory terms, but I think that "material" covers it. And maybe it's a little easier to understand.

Mr. Gutnick: Your Honor, again, this is merely an undue emphasis on an element of the cause of action without mentioning any of the other elements of the cause of action, and it focuses the jury's mind on one aspect of the cause of action which seems to me is prejudicial.

If it is covered in Your Honor's charge, then it's part of the case, and there is no need for it to be a special interrogatory.

I don't even think it's the proper subject of a special interrogatory.

The Court: Isn't the entire subject matter included in Interrogatory 13 and probably 9 then?

Mr. Gutnick: Your Honor, we think it is. It would be included in both 6—Interrogatory No. 6 and Interrogatory No. 11.

Mr. Schmidt: We really think it shouldn't be included in any of them, but it would be appropriate for the Court to instruct the jury that if any breach has to be a material breach, and define what a material breach is in the charge, rather than focus on that one point in any of the interrogatories. That would be our position, Your Honor.

Mr. Gutnick: It's covered by 11 where they talk about failure to comply.

Mr. Schmidt: Yes. All right. But I—

Mr. Booker: If the jury feels, Your Honor, that there have been damages, and answers the question that AMI did sustain damages as a result, I don't think that answers the statutory question which is: Did it substantially impair, whatever those damages were? Did that substantially impair the value of the whole contract?

That's really the point that we're trying to get at.

Mr. Schmidt: Well, it's really—the unfair part of it is that the short shipments, plus the rising prices, create something entirely different than just a short shipment situation.

Mr. Booker: Well, Your Honor, the plaintiff suggested separating out short shipments and price into two interrogatories, and so that's already done.

I mean, if you want to go back to one interrogatory—

Mr. Schmidt: Well, the reason I think you have to separate them out—but the point of it is that you—I think it's appropriate to argue either way, that on the short shipments—but it is my intention to argue that short shipments, plus the higher price create a situation affecting the contract, because under the Sharon interpretation, they could lump it all in at the end on the average basis and you would have, when there is a falling market—and they say Friedman anticipated it. It would be interesting to see how that's handled. Friedman anticipated it. You are going to lump all the deliveries to him at some future time when the prices are higher and the market is falling, and that has something to do with the value of the contract.

At least I intend to argue that and Mr. Wentley will hear it, and you will, so I might as well tell you now.

See, you can't separate out short shipments alone. I think it's misleading to the jury. It's a question of argument and it's a question for the charge of the Court, would be our position, Your Honor.

I was thinking this up last night while Mr. Gutnick was over here working on the interrogatories. But that's my theory.

Mr. Booker: We are not separating out anything, Judge, that isn't separated out on it by the request of the plaintiffs.

Mr. Gutnick: Your Honor, we agreed last night that Interrogatories 7 and 11, in their present form, were the interrogatories to be submitted to the jury. This request

wasn't made last night. Seven and eleven covers that concept.

What they are trying to do now is isolate out one term, or element of a cause of action, and I think that's highly prejudicial.

Mr. Schmidt: We are trying to delineate just what type of breach, in the event a breach has been found, so when you look at this later, if that should become necessary, you are going to have to know, and we suspect that you would not have the information you would need unless the type of breach is actually defined by the answers which the jury gives.

The Court: You mean as to shipments?

Mr. Wentley: As opposed to a technical unimportant type of breach, which could have critical legal—

The Court: If AMI sustains damages as a result of a breach? What more is required to make it material?

Mr. Booker: Your Honor, the statute requires that the default with respect to a particular installment substantially impair the value of the entire contract.

Now if the jury answers the question on damages and decides to give damages only in relating to June and July, for example, and say those damages amount to 30 or $40,000, maybe they did suffer those damages, but that doesn't answer the question as to those two installments. But that doesn't answer the question whether, as to the entire contract, the value of the contract had been substantially impaired.

So that they should be entitled to damages for the entire contract.

Mr. Robinson: Well, Mr. Booker, paragraph seven, Special Interrogatory 7, in no way, says is a material breach in the obligation of June. It says a material breach of the agreement. And that essentially is what that particular section of the Uniform Commercial Code is saying.

Now what you would really like is to completely define it down to each and every element and embody into this interrogatory the words of the statute, in which case we might add a couple of case languages, and then we don't have the special interrogatories any more. We have the legal argument you are going to submit to the jury.

Mr. Gutnick: If the jury is instructed on this issue, that takes care of the whole matter.

The Court: What is the request for instruction concerning a matter of material?

Mr. Booker: No. 7, Your Honor. And No. 7 and No. 12.

Mr. Gutnick: I think he's asking for the charge—

Mr. Schmidt: You submitted a request for charge on the—

Mr. Booker: I'm sorry, Your Honor. I don't have a copy of our request. It's in my briefcase.

Will you excuse me a moment, Your Honor?

The Court: All right.

Mr. Booker: It's our No. 17, Your Honor. If you find that there was no substantial impairment of the entire contract to the plaintiff in August, 1974, then you must find that plaintiff's repudiation of the contract, at that time, was a breach of the 1974 agreement.

Mr. Gutnick: Your Honor, we've submitted an instruction on this point likewise. It is our No. 27. It goes as follows: You are instructed, as a matter of law, that if a party's nonperformance of part of a contract has resulted in a substantial impairment of the value of the contract, it makes absolutely no difference if he performed all of his other obligations completely, and it makes absolutely no difference if prior breaches of contract had been forgiven or waived by the party who was injured.

If you find that any of the terms of the price, quantities or ton of delivery were important to plaintiff, and that defendant either failed to honor or appeared as if it would not honor any of those terms, then you are instructed to find that defendant's actions substantially impaired the value of the contract.

The Court: And, therefore?

Mr. Gutnick: Well, then we go on sequentially. Therefore, we're entitled to recover if there is no—

The Court: If the defendant substantially impaired the value of the contract by his breaches of the agreement?

Mr. Gutnick: Yes. The terms of the agreement, yes.

The Court: Then AMI was justified in terminating it?

Mr. Gutnick: Yes.

The Court: That's what you mean to say. Therefore, there was no breach by AMI. This is what you mean to say?

Mr. Gutnick: We say—of course, we say there was —yes. No breach by AMI.

Mr. Schmidt: But there was a breach by Sharon.

Mr. Gutnick: Right.

The Court: All right. Now where is the interrogatory with respect to the breach by AMI?

Mr. Booker: No. 15.

Mr. Schmidt: I think those are 15 and 16.

Mr. Gutnick: Yes. 15 and 16, and they don't have—they have the language we agreed upon last night.

The Court: It's the plaintiff's position that if an instruction concerning the subject matter covered in 7 and 12 would be given in connection with 15, that you would have an implied answer to 7 and 12, which would not require a specific submission?

Mr. Gutnick: That's correct, Your Honor. If the instruction is given with respect to all of them, then it would not require a specific submission to the jury, and we would go along with that.

The Court: Then this calls for a definition of what failure to comply encompasses with respect to Interrogatory 15?

Mr. Gutnick: That would be correct.

The Court: You realize we're going to ask this jury to answer 24 interrogatories?

All right. I do think that the subject matter should be treated under the question of AMI's breach of a contract. That if any breach by Sharon was a material breach, that there would be justification for termination of the contract which would not constitute a failure to comply.

This is what you are saying, that you are establishing your justification, or you are meeting the issue of

justification in another with respect to the question of whether there was a breach.

Mr. Wentley: We're also saying with regard to our conduct that any breach which they find we committed would have to be material. That's the thrust of our request.

The Court: Well, I think this is a question for argument and will be answered by the interrogatory which relates to the amount of damages sustained.

Mr. Gutnick: That means we eliminate 7 and 12 from this, Your Honor?

The Court: In that order. But not the subject matter. The subject matter is pertinent to 15.

Mr. Booker: In that event, Your Honor, I think that we ought to treat it in instructions and leave the interrogatories without 7 and 12.

The Court: All right.

* * * * *

(Thereupon, court reconvened in chambers on Thursday, December 22, 1977 at 2:20 o'clock p.m.)

The Court: I believe, as suggested yesterday, we thought we would dismiss the jury for lunch, and then invite counsel to make any comments they wish or submit any requests or objections.

Do counsel have any requests?

Mr. Wentley: As usual, I have a proposal that probably won't fly.

But I was going to suggest, Your Honor, that in view of the nature of the special interrogatories, and in view of the Court's previous statements, that it will be

reviewing the legal questions, I would think that if both the plaintiff and the defendant were granted exceptions to those points previously submitted in writing, which was not covered in the charge, that that can be all reviewed at a later time and everybody protected, as would the Court.

There may be something wrong with the idea, but I can't think of it.

The Court: I would like the opportunity to correct any errors or—

Mr. Schmidt: I don't know if that's possible under Rule 51.

Rule 51 really says you can't mousetrap the Court.

Mr. Wentley: No, sir, I'm not.

Mr. Schmidt: And really what you have to do is tell the Court now—and I don't mean you. I'm speaking you impersonally—if any of us think that the Court has made any mistake that we are going to rely on later, that the time to mention it is now, and give the Court an opportunity to reconsider it.

First of all, I don't think that's in keeping with the spirit of Rule 51.

And, secondly, even if we did it, I'm not sure that it would be valid under the rule, because we're supposed to tell the Court now what we think so the Court can consider it.

And I think that's the purpose of the Judge's question here.

Mr. Wentley: I respectfully disagree. We submitted written points. Those were our requests.

The Court: Well, I have denied the requests as stated to the extent that they have not been granted in substance.

Mr. Booker: And we note an exception.

The Court: If there is any fundamental error which was previously objected to, I don't think the lack of an objection in that respect would do it, but I'm now inviting counsel to make any request they wish or to take exceptions to the charge so that it might be corrected before the jury begins their actual deliberations.

Mr. Gutnick: Your Honor, we would respectfully request that Your Honor give a charge with respect to the non-compartmentalization of evidence, especially as it relates to the conspiracy and Section one case.

We had a proposed charge to that effect.

The Court: Non-compartmentalization of what?

Mr. Schmidt: I think the courts have said, Your Honor, that in conspiracy cases, and especially in antitrust conspiracies, you don't look at each element of the situation separately, but you don't compartmentalize it. But you look at the whole issue altogether.

Mr. Gutnick: The charge we suggested, Your Honor, was our suggested No. 18, under antitrust, and it states in cases such as this the plaintiff should be given the full benefit of its proof without tightly compartmentalizing the various factual components and wiping the slate clean as scrutiny of each. The nature, character and effects of a combination or conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole.

And in a case like the one before you, the duty of the jury is to look at the whole picture and not merely at the individual parts.

That charge was given in the Continental Ore case suggested by the Supreme Court, 370 US 690 1962, and the Third Circuit adopted it in Pitchford vs. Pepi, 531 Federal Second, 92, which cert. was denied.

The Court: Have I suggested that it was necessary to show such agreement?

Mr. Wentley: Well, you have said that they are to review all of the evidence in the entire matter with respect to each of the issues.

The Court: Whether they combined or conspired?

Mr. Wentley: Yes, Sir. But you have told them that they must review all of the evidence, and I think, Your Honor, that that is a short form of saying in all of this language—

Mr. Gutnick: Your Honor, I think Your Honor's instructions on that point, I think, was general, and perhaps appropriate if the case was purely a contract case.

Since it is not that, and because this is a charge exclusively appropriate to antitrust cases and cases involving conspiracies, combinations, where it is very difficult to prove that the parties sat down and you have to use a whole series of circumstantial events to bring the whole picture together, I thing it's an appropriate charge and one that's been certainly adopted by the Supreme Court.

Mr. Gutnick: We have nothing further to add, Your Honor.

The Court: I will deny that request, I think, in view if the instruction at this time.

Mr. Gutnick: I would just note an exeception.

The Court: Noted to the issue that it would be prejudicial?

Mr. Gutnick: We would note an exception on the record, please.

Your Honor, with respect to the contract claims, we had a proposed charge relating to the UCC concept of good faith and commercial reasonableness, if I can locate that for you as we suggested it.

The Court: Which, of course, I did not give in haec verba because I didn't have it before me.

Mr. Gutnick: It was our Suggested No. 21, Your Honor, under Contracts and it reads, "It is the essence of the law of contracts that people should act with the utmost of good faith."

Now, when merchants, that is people who deal in goods of the same kind, have made a contract together, this concept of good faith means not only that they are to act in total honesty with one another, but they shall also act in accordance with the reasonable commercial standards of fair dealing in the trade, specifically here in the steel industry. This language is directly from Sections 2103 and 2104 of the Uniform Commercial Code. And since this is a case involving the Uniform Commercial Code, we thought that would be an appropriate instruction.

The Court: And in such an instance, wouldn't then there be evidence of standards?

Mr. Gutnick: Standards of good faith?

The Court: Yes.

Mr. Gutnick: Well, I think, as I read the proposed instruction, Your Honor, I think that it does imply a standard that there be total honesty with one another and commercial reasonableness.

The Court: I believe that has been charged in substance.

Mr. Gutnick: I take it then Your Honor is denying—

The Court: Denied as stated.

Mr. Gutnick: Noted exception to that.

Your Honor, I wasn't quite sure in my own mind whether or not there was a charge on circumstantial evidence. I didn't recall anything specifically and, so, I would just request that if it hasn't already been done, I don't think it has, at least I don't recall that it has, that there be a general instruction given on circumstantial evidence.

The Court: There was none. The question is whether it is necessary or appropriate.

Mr. Gutnick: Well, we would take the position that it would be appropriate, Your Honor, especially in view—

The Court: What instruction do you request?

Mr. Gutnick: Okay.

The Court: Evidence may be of two kinds, direct and circumstantial.

Mr. Gutnick: That is the one, Your Honor.

The Court: Then end up by saying it may make no difference what kind of evidence it is? I am not sure that circumstantial evidence isn't often more reliable than direct evidence.

Mr. Gutnick: Yes. We proposed an instruction of that kind in No. 6 under General Instructions and No. 7.

Maybe Mr. Wentley would want the same instruction, I am not sure.

The Court: Well, I only find that I get into difficulty when I characterize evidence as to avoid giving the impression that one kind of evidence is better than another kind of evidence.

Mr. Wentley: Can we go off the record for just a moment?

(Whereupon, an off the record discussion was had.)

Mr. Gutnick: There is no objection to it.

The Court: No objection to what?

Mr. Gutnick: To my request for a circumstantial evidence charge.

The Court: All right.

Mr. Gutnick: We also think it is particularly appropriate here that Your Honor give an instruction concerning the concept or idea of duplication of damages so as the jury, by virtue of the special questions, is not—does not exercise restraint from answering yes or putting in an amount of damages in situations where they feel there may be a duplication. I would think that an instruction from Your Honor to the effect that the jury should not concern itself about duplicative damages, but that this is something that the Court can determine later.

The Court: I had intended to give such a charge, that there may appear to be damages for the—for the same injury, they should consider any amounts that they are calculating with respect to the particular issue they

are considering. I just didn't, but, all right. What does counsel for the defendant say?

Mr. Wentley: You have completed yours?

Mr. Gutnick: Yes.

Mr. Booker: I have a few points on the instructions that were given, Your Honor, and then I guess we can talk about additional ones.

The Court: All right.

Mr. Booker: In discussing or describing to the jury the plaintiff's or Sharon's claims with respect to the 1973 agreement, Your Honor, I believe you characterized Sharon's position as the position for 1973 that the shipments could be made on the basis of an average, but over the period of the contract, the 1973 contract. Respectfully, Your Honor, that is not our position with respect to the 1973 agreement.

Our position there is that the 1973 agreement, with respect to deliveries, was consistent with the prior year's arrangements between the parties which was that shipments would be made on—on a basis of an as-available production space basis and not that they would be made within any particular year. We think that ought to be corrected.

The Court: I don't recall that I did fail to distinguish between Sharon's alleged commitments, which was for 1973 and 1974. I believe I stated that there was a dispute as to the time and quantity of delivery for 1973, it being the plaintiff's position that there was a commitment for the delivery of minimum of regular, minimum monthly quantities and that it was the defendant's contention that they were committed to the delivery of the total amount over the entire period, only

then is this the equivalent of average monthly shipments.

In other words, do I understand Sharon's postion to be other than if—if they had withheld delivery until October and then delivered five-sixths of the total quantity, that it would not have been in compliance with the arrangement? The delivery of the 60,000 tons in December is the equivalent to the delivery of an average of 5,000 tons per month?

Mr. Booker: No, Your Honor, this is not our position with respect to the 1973 agreement.

The Court: How can it be different from that?

Mr. Booker: Our position with respect to the 1974 agreement is that we had a commitment to supply steel, substantial amounts, and that the supplies would average 6,000 tons a month. That is accurate with respect to the contract for 1974.

But with respect to the contract for 1973, Your Honor, our claim is that this was to use our terms because there, the ones that we're familiar with, that this was a flywheel arrangement.

The Court: Right.

Mr. Booker: That Sharon was committed to make shipment of the tonnages at the flywheel prices, but that there was no agreement as to time, not even within the one-year period of the contract. That is the respect in which we believe you—

The Court: That's right, then I did misrepresent your contention. Do I interpret it to mean that you didn't commit yourselves to deliver any quantities at all during the year other than on a flywheel basis?

Mr. Booker: That's correct, Your Honor.

Mr. Gutnick: Your Honor, with respect to the 1973 agreement, Your Honor also mentioned that there was a dispute not only as to the shipping schedules, but also as to price and I believe, at least it is my understanding, that there is no dispute as to price under the agreement for 1973. And if Your Honor is correcting that, you might also—we would respectfully suggest that Your Honor would indicate that.

The Court: I was very careful to avoid any issue as to price in 1973.

Mr. Gutnick: I don't recall this—

Mr. Robinson: With all due respect, I do believe inadvertently you did mention that at one part, but at the latter part, the conclusion of your remarks, with respect to the 1973 agreement, you did not so state it. But it did appear, I think you will find that the record will indicate, that it does appear in your initial outline because you probably were concentrating on the other years' contract.

The Court: I was fully aware of it and intended to avoid any reference to a price issue with respect to 1973.

Mr. Gutnick: I think Your Honor might have fallen into the same problem as we did when we referred to Ohio Metals sometimes as Ohio Industries or something like that. We—you get confused and I think, perhaps, it just inadvertently crept into the thing.

Mr. Robinson: It is very possible, Your Honor, that I am in error about the years as well, but I do think that I had noted that at the time.

The Court: All right. You think it ought to be corrected?

Mr. Gutnick: Well, consistent with the correction you're going to make on their position on the 1973 agreement. You might suggest or advise the jury that in the event that you did indicate that there was a mention of price, that they should disregard it. There is no dispute as to price.

The Court: All right.

Mr. Booker: Next point, Your Honor, in going through the interrogatories, it struck me that we might have left some language out and that the jury, perhaps, ought to be directed that they need not answer Special Interrogatory No. 4 as relating to cancellation based on full performance if they answer "Yes" to Interrogatory No. 2, which is based on that absolute cancellation.

The Court: Oh, yes. You think it is prejudicial to have them answer both questions?

Mr. Booker: I think we end up then with inconsistent fact-finding.

The Court: Unless they answered them consistently.

Mr. Gutnick: We would be certainly willing to strike 4. It really is unnecessary if they—whatever they answer 2—2 or 3, whatever, it could be determinative of this issue.

Mr. Booker: Your Honor, I think—well, I think the easiest way around it is simply to say if you—to say answer Interrogatory 4 only if you answer Interrogatory 2 and then no.

Mr. Wentley: It would be appropriate once, if you decide to so reinstruct, to give them substitute pages.

The Court: Do what?

Mr. Wentley: To give them a substitute page or to—I know that it is a hard thing to remember in an oral charge to go back upstairs and then note for certain what he said on 4, and I would suggest a substitute page be distributed to the jury.

The Court: What have counsel agreed to with respect to the interrogatory?

Mr. Robinson: We have not agreed, Your Honor. We suggest that it is academic and it should be stricken since there's no purpose to the interrogatory as such. Interrogatory No. 2 raises the issue that is in contention and, therefore, it is not necessary for Interrogatory No. 4.

The Court: Counsel for the defendant indicates additional language, the necessary effect of which would be the same, that you only answer it in the event of a negative answer to Interrogatory No. 2.

Mr. Booker: I thought we were beyond this point, Your Honor. We talked about this and decided that this was going in last night. I am just saying that questions as phrased do present the possibility which could easily be eliminated of inconsistent answers.

The Court: Well, isn't it on the—do we need a substitute page? Isn't it, as a matter of fact, suggested in it after the interrogatory that the answer to that only be given if there is a negative answer to 2?

Mr. Booker: No, that is not in there and that is what I am suggesting not to be in there, Your Honor.

Mr. Gutnick: Your Honor, I think it is very clear from 2 to answer 2 one way or the other. You definitely don't need 4.

The Court: Unless there is a subsequent interrogatory that Sharon didn't breach the 1974 agreement as to delivery.

Mr. Booker: Right. It is really just a mechanical point, Your Honor, that I just think maybe we ought to have a new page typed up that says—adds that language at the beginning, if your answer to No. 2 was no, and then—or answer this only if your answer to No. 2 was no.

Mr. Wentley: No. 2 and 4 are quite different.

Mr. Gutnick: We'll agree with that, Your Honor.

The Court: John, have a substitute page made up starting the page, "Answer this only if your answer to."

Mr. Wentley: Putting that on 4, not Interrogatory 2?

Mr. Gutnick: Correct.

Mr. Booker: Yes.

The Court: "Answer this interrogatory only if your answer to Question No. 2 is 'Yes.' "

"Or is 'No.' "

Mr Wentley: "No."

Mr. Gutnick: "No."

Mr. Booker: Your Honor referred to Interrogatory or Special Interrogatories 7 and 12 as not being submitted. Were those pages in the pages that the jury received?

The Court: I don't know that.

Mr. Gutnick: Your law clerk told me they were not.

Mr. Booker: I am sorry.

The Court: All right. If they were, we would have a problem with that.

(Whereupon, an off the record discussion was had.)

Mr. Booker: For the record, Your Honor, we note an exception to the charge relating to—from which Your Honor referred, I think without citing, to the Restatement of torts, Section 766, which we think does not—

The Court: 766, what was it?

Mr. Booker: I don't recall the subsection.

The Court: I don't think a Court should ever give instructions to the jury without having them written up and reading them verbatim, but I just didn't have time with this one, that's all. I am not proud of it, but I hope it is covered, the issues are covered, that's all.

Mr. Booker: I beg your indulgence, Your Honor.

The Court: That's all right.

John went to have that page made?

Mr. Gutnick: I believe he did, Your Honor.

Mr. Booker: Yes, he did.

Your Honor, we would request that the jury should be instructed concerning the requirement of mitigation of damages, which, as I recall, there has been no instruction on. This would relate to our proposed Instructions 38, 39 and 40, which three instructions concern the obligation to mitigate direct damages and the requirement precedent to recovery of lost profits that the plaintiff or the party claiming damages must demon-

strate that he could not have avoided the consequential damages by the purchase of substitute products or otherwise.

We think that the testimony of Dr. Kuehn, as Your Honor may recall, specifically said he didn't take account of any facts relating to mitigation of damages. This is an affirmative requirement for the recovery of consequential damages and suggested should be submitted to the jury.

Mr. Gutnick: Your Honor, we would agree that a general charge applicable to both parties on mitigation would be appropriate with one caveat, and that is under the antitrust laws there is no obligation to mitigate damages. I think we run into some problems if it is not carefully phrased.

The Court: Are you sure you want the jury instructed on the issue on damages at this time?

Mr. Wentley: The answer to your question is no, I am not sure.

No, we made the request and I think we have to pursue it, Your Honor.

Mr. Booker: And with respect to the antitrust claims, Your Honor, our Instruction No. 70, which is directly taken from the ABA Proposed Instructions or Practice and Instructions under the Antitrust Laws, does concern the ability or the requirement that a party can sit idly by for damages.

The Court: I can't find your requests, that doesn't mean I haven't looked at them.

Mr. Wentley: We have—have an extra copy here, Your Honor.

Mr. Booker: On the contract issues, Your Honor, it would be Nos. 38, 39 and 40.

The Court: This is not what was agreed to by the plaintiff, I don't think.

Yours was an agreement to a general charge on mitigation of damages?

Mr. Gutnick: That is correct, Your Honor. We don't—

The Court: You have Defendant's Requests No. 38?

Mr. Gutnick: Don't have it in front of me. Can I see yours, Dan?

(Whereupon, an off the record discussion was had.)

Mr. Gutnick: We would agree to a general charge on mitigation of damages, but not a charge that argues the defendant's case.

The Court: Nos. 38, 39 and 40 are denied as stated at this point.

Did you have any alternative requests?

Mr. Booker: Well, perhaps we can do something with our No. 70, Your Honor. I believe that even though this first line here refers to antitrust laws, I think if we took out the word "antitrust," this is generally the law applicable to mitigation of damages.

Mr. Wentley: Start with the second sentence, "If plaintiff fails to mitigate, then—."

Mr. Gutnick: "In this case, if the party fails—"

The Court: "If either party fails," then to define mitigate.

Mr. Wentley: Could I be excused for just a minute, Your Honor?

(Whereupon, a recess was had.)

(Thereupon, court reconvened in chambers at 3:35 o'clock p.m.)

Mr. Booker: Your Honor, I understand that you have denied our request for charge on the mitigation of damages. That's our charges 38, 39, 40 and 70.

And we take exception to that, Your Honor.

Let the record show that in light of your ruling, the counsel have agreed upon a different form of charge, which I understand will be given.

Secondly, Your Honor, we request, in line with Sharon's proposed charge, No. 71, that the Court instruct the jury that in an antitrust case, damages are trebled and that such trebling is to be done by the Court and not by the jury.

Mr. Schmidt: We object.

Mr. Gutnick: We would object to that along the line of the Pennsylvania cases rising out of the district and Circuit, that treble is improper for the jury to be apprised of. It's prejudicial.

The Court: What case is it?

Mr. Gutnick: I can cite you to the Stewart vs. Piper Aircraft in the Middle District of Pennsylvania, Your Honor, where extensive briefs were written on that subject.

There is also a reported opinion there.

The Court: Mr. Booker, are you familiar with the case?

Mr. Booker: No, I'm not, Your Honor. We rely, Your Honor, on the ABA Proposed Instructions at page 202 and 203, and on the instructions as reported in Gray vs. Ford Motor at 355 Fed. Sup. at page—

The Court: 355 F. Sup., Vince. What page?

Mr. Booker: 878, Your Honor.

The Court: Judge Knox simply states that he did and why he did it. Does the Court of Appeals have any comment on it?

Mr. Booker: My citation to the case shows that it was reversed on other grounds, which we would not have done without checking to be sure that that was right.

Mr. Gutnick: Your Honor, the statute provides that the trebling is to be done by the Court, and the question now is whether or not the Court should advise the jury of what it is going to do.

We think that would be highly prejudicial, and I think the majority of the Circuits disfavor any kind of notification to the jury to that effect.

The Court: Judge Knox says he took the charge from Devitt & Blackmar.

Mr. Booker: I haven't checked that, Your Honor. But, as I noted, it's one of the ABA suggested instructions.

The Court: We do have here a special interrogatory asking the jury to assess the damages, the losses sustained as a result of an antitrust violation.

I have no reason to believe that a jury is aware that treble damages are applied to antitrust actions.

Mr. Schmidt: I think the Court has explained it is purely compensatory.

The Court: All right. We better—I will deny the request to instruct on the issue of treble damages.

Mr. Booker: We note an exception, Your Honor.

Finally, Your Honor has noted he has denied the request for charge of the defendant as submitted in the pretrial, our requests for charge in nearly every instance, accompanied by our citations to the authorities and which gives the basis for the proposed request for charge and in each instance relying on the authorities that we cite there. We take an exception to the Court's denial of all the requests for points of charge.

Mr. Schmidt: We do the same as to ours, Your Honor.

The Court: All right.

Mr. Gutnick: Your Honor, I—I guess the one matter I just want to make sure of, that I am clear on this is the instruction of duplication of damages. Were you going to clarify that with the jury?

The Court: Well, I think it is easy to concede, is it not, that the parties who sustained the losses are entitled to damages only once?

Mr. Gutnick: That's right, Your Honor. That is duplicated, but, nevertheless, that they arrived at the question of damages and in response to the questions they are not to be concerned about the fact that they may be awarded damages for the same injury.

Mr. Booker: There is one other final point with regard to the exhibits that are shown to the jury. One of those exhibits is the 1976 annual report of Sharon which contains matters which have been discussed with the Court previously which we believe are irrelevant and we submit that that particular exhibit should not be sent to the jury.

Mr. Gutnick: We agree with that, Your Honor.

Mr. Schmidt: We agree with that, Your Honor.

The Court: All right.

Get the jury down.

(Whereupon, the in chambers conference was concluded and the following proceedings were held in open court.)